No. 11694

In the United States Circuit Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SCIENTIFIC NUTRITION CORPORATION, D/B/A CAPOLINO PACKING CORPORATION, RESPONDENT, AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. L., AND CALIFORNIA STATE COUNCIL OF CANNERY UNIONS, A. F. L., INTERVENORS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case comes before the Court upon petition of the National Labor Relations Board for enforcement of its order issued against respondent on December 13, 1946 (71 N. L. R. B. 1003; R. 35–38), following the usual proceedings under Section 10 (c) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*).[1] Jurisdiction of this Court rests upon

[1] Relevant portions of the Act appear in the Appendix A, *infra*, pp. 27–28. The Board's decision and order were issued prior to, and present no question affected by, the amendments to the National Labor Relations Act by Section 101 of Title I of the Labor Management Relations Act, 1947, effective August 22, 1947 (Pub. L. 101, 80th Cong., 1st Sess., June 23, 1947).

Section 10 (e) of the Act. The unfair labor practices occurred at respondent's plant in Atwater, California, within this judicial circuit.[2]

STATEMENT OF THE CASE

A. The facts

The issue in this case, namely, whether the Board properly found that respondent violated Section 8 (1) and (3) of the Act by rendering assistance to the Teamsters[3] and by discharging an employee because he refused to join the Teamsters, turns upon the question whether, as respondent claims, it had a closed-shop contract with the Teamsters at the time of the discharge and the acts of assistance. Since the collective bargaining contract upon which respondent and the Teamsters rely is the same Master Agreement (*infra,* pp. 3–4) involved in *N. L. R. B.* v. *G. W. Hume Company, et al.,* No. 11693, in which the Board has already filed its brief with the Court, the question herein is identical with, and will be determined by the answer to, one of the questions presented by the *Hume* case, namely, whether the Master Agreement was a closed-shop contract.

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[2] No question of the Board's jurisdiction is presented since respondent admits it is engaged in commerce within the meaning of the Act (R. 42; 99). Respondent, a New York corporation, is engaged at its plant at Atwater, California, in the business of canning and processing fruits and vegetables. The annual sales from the Atwater plant total approximately $1,500,000, of which approximately 90 percent constitutes sales to points outside the State of California (*ibid.*).

[3] International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L.

The essential facts, as found by the Board,[4] are not disputed by respondent.[5]

1. Early bargaining relations between respondent and Local 22382

In 1941, the Capolino Packing Corporation, operated by J. Capolino, entered into a collective bargaining agreement with Cannery Workers Union Local 22382, a Federal Labor Union of the American Federation of Labor, herein called Local 22382 (R. 43; 214–215). By this agreement, the parties adopted and agreed to be bound by a collective-bargaining contract, known as the Master Agreement,[6] which had been executed by the California Processors and Growers,

[4] The Board adopted the primary findings of fact set forth in the Trial Examiner's Intermediate Report (R. 32, 42–53) and, with certain modifications and exceptions, also adopted the Trial Examiner's conclusions and recommendations R. 32–37, 53–69). In the following statement of the facts, references preceding the semicolon are to the Board's findings, and following references are to the supporting evidence.

[5] Respondent filed no exceptions to the Trial Examiner's Intermediate Report (R. 32), and raised objections to certain of the Trial Examiner's legal conclusions, but not to his fact findings, in oral argument before the Board. The Teamsters filed exceptions to the Intermediate Report, and argued orally before the Board, raising objections to certain of the Trial Examiner's conclusions and recommendations and to the findings of fact with respect to certain of respondent's acts of assistance to the Teamsters, but not to the finding that respondent discharged Employee Cedar because he refused to join the Teamsters (R. 27–30, *infra*, p. 11).

[6] The Master Agreement was not introduced as an exhibit in the record in the instant case. Because of a scarcity of copies at the hearing and in view of the fact that it had been made an exhibit in a number of other Board cases involving the contract, the parties agreed that the Board was sufficiently supplied with copies so that its formal introduction would not be necessary in the instant case (R. 196–197). For the convenience of the Court we

Inc.,[7] and the California State Council of Cannery Unions, as the representative of the various A. F. L. cannery workers' unions in the state (R. 43; 174, 215).[8]

Capolino continued to operate under the Master Agreement until early in 1944, when he sold his plant to respondent (R. 43–44; 152, 215, 220). Respondent continued to operate the plant as the Capolino Packing Corporation, with Capolino as manager and, until the advent of the intra-A. F. L. jurisdictional dispute here involved (*infra,* pp. 4–6), maintained the same collective bargaining relations with Local 22382 that Capolino had (R. 43–44; 214–217, 220).[9]

2. The Teamsters' assertion of jurisdiction over Local 22382

During the period discussed above, Local 22382 was not affiliated with any of the various A. F. L. international unions, but was what is known as a Federal Local Union, affiliated directly with the A. F. L. itself (R. 43; 8, 100, 107–108, 137, 220, 234). On May 3, 1945, however, the A. F. L. transferred jurisdiction

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have printed the Master Agreement in Appendix B hereto (*infra*, pp. 29–55). There is, of course, no question as to its authenticity. It appears as an exhibit in the printed record in the *Hume* case, *supra* (see *Hume* Record, pp. 615–648).

[7] An association of west coast packing concerns, hereinafter referred to as the "C. P. & G."

[8] Capolino Packing Corporation was not a member of the C. P. & G., but, like a number of other non-member cannery employers, adopted the Master Agreement, which is also referred to in the record as the "C. P. & G." Agreement and the "Green Book" Agreement (R. 43; 174).

[9] The only apparent change was the discontinuance of the check-off of union dues by respondent; thereafter, Local 22382 collected dues through the shop steward (R. 128, 152). However, the dues check-off had always been voluntary and not pursuant to the Master Agreement (R. 141, 152).

over Local 22382, and other similar A. F. L. locals in the west coast canning industry, to the Teamsters (R. 44–45; 176, 186–187, 220, 234). This action of the A. F. L. met with determined opposition on the part of some of the officers and members of Local 22382 (R. 45–46; 138, 147–148, 220–222, 235). After the transfer of jurisdiction was announced, certain of the former officers and members of Local 22382 withdrew from the Local and established an independent union known as the Cannery and Food Process Workers Union of Modesto Area (herein called the Cannery Workers Union), affiliated with the Cannery and Food Process Workers Council of the Pacific Coast (herein called the Cannery Workers Council) (R. 45–46; 158, 200, 205–206). The Cannery Workers Union, in competition with the Teamsters, sought to establish itself as the bargaining representative of respondent's employees (R. 45–46; 130–136, 144, 149–151, 152, 158, 162, 200, 205–206).[10]

Despite the opposition of the employees, the A. F. L. carried out its jurisdictional program and the Team-

[10] In 1945, the Cannery Workers Union petitioned the Board for certification as the collective bargaining representative of respondent's employees and of the various cannery industry employees the Teamsters were seeking to represent. And on October 15, 1945, the Board issued its Decision and Direction of Election and included the Cannery Workers Union on the ballot (R. 171–172). *Matter of Bercut-Richards Packing Co., et al.*, 64 N. L. R. B. 133, 143, 144. See, also, Supplemental Decision and Order, 65 N. L. R. B. 1052, 1061. Subsequently, the Board found that the Cannery Workers Council and its affiliates were "either defunct or no longer interested in the proceedings" and determined to omit them from the ballot in further elections. The *Bercut-Richards* case, Second Supplemental Decision, 68 N. L. R. B. 605, 609.

sters immediately sought to take over the bargaining arrangements theretofore established between Local 22382 and various cannery enterprises, including respondent. Thus, on or about May 8, 1945, the Teamsters notified respondent, by letter, that the Executive Council of the A. F. L. had awarded it jurisdiction over the cannery workers and asserted that, thereby, it had "inherit[ed] the agreement now in effect between your company and the American Federation of Labor and the Local Cannery Workers Union," i. e. Local 22382 (R. 44–45; 176, 186–187).

Similarly, by a letter dated May 11, 1945, the Cannery Workers Council informed respondent that the A. F. L. award in favor of the Teamsters, and the "effort * * * to transfer all members of Local No. 22382 to that Union [was] without regard to the wishes of the members," and that those members had expressed their dissent by having "organized themselves under the name of Cannery and Food Process Workers' Union of Modesto Area * * * under and by virtue of a Charter issued to it by Cannery and Food Process Workers' Council of the Pacific Coast." Challenging the legality of the Teamsters' attempt to "substitute" itself as a party to the collective-bargaining contract between respondent and Local 22382, and asserting its own claim to the status of collective-bargaining representative, the Cannery Workers Council declared that "the Local Union as an autonomous organization is the representative in collective bargaining matters of all the employees in the plant except supervisory employees" (R. 45–46; 200–206).

3. Respondent's assistance to the Teamsters

Faced with these conflicting claims to the position of exclusive bargaining representative of its employees, respondent, as the Board found (R. 32–33, 53–55, 58), failed to maintain the neutrality imposed by the Act, and threw its active support on the side of the Teamsters. Thus, on May 14, 1945, the Monday following the receipt of the letters from the Teamsters and the Cannery Workers Council, announcing the conflicting claims of the two unions (*supra,* pp. 5–6), respondent assembled its employees in the warehouse at 8:30 in the morning, during working hours (R. 46; 110–111, 177).[11] Present at this meeting, and representing respondent, were Manager J. Capolino, Plant Superintendent McIsaac who was also in charge of labor relations (R. 46; 173, 177), Assistant Plant Superintendent Stewart (*ibid.*), Spafford, foreman of the warehouse (*ibid.*), and White, the assistant manager at the time (R. 46; 177, 207).[12] Capolino informed the employees that the Teamsters "were going to take over the plant," and that "there was nothing * * * [the employees] could do about it." (R. 46; 111, 140). Capolino further warned the employees that if they did not join the Teamsters, the Teamsters would stop deliveries

[11] At this time, the plant was not engaged in processing or canning operations and only the "regular" employees, of whom there were 26, were present (R. 46; 142, 178). During the active canning seasons this small staff was augmented by "seasonal" employees (*infra*, p. 16, n. 18).

[12] After Capolino's death in November 1945, White became the manager of the plant (R. 128, 207).

to the plant, causing a cessation of operations and a resultant loss of employment, and declared that "there is nothing else we can do * * * but * * * go with the Teamsters" (R. 33, 46; 111, 140, 178–179). Capolino referred to the letter respondent had received from the Teamsters (R. 111, 178), and although Employee Gus Cedar[13] asked for time in order to contact Local 22382 and "find out what it was all about" (R. 46–47; 112, 179), Capolino made no mention of the letter respondent had received from the Cannery Workers Council nor of the Council's representation claim (R. 112). Immediately following the meeting, respondent posted the Teamsters' letter in the plant (R. 198–199).

About two hours after this meeting, representatives of the Teamsters came to the plant and asked respondent for an answer to their letter of May 8, 1945 (R. 47; 179–181). Capolino and Superintendent McIsaac declared that respondent intended to do nothing until such time as the employees designated the Teamsters as their representative (R. 47; 181). When the Teamsters' representatives asked permission to address the employees in the plant, however, the permission was promptly granted (*ibid.*). Again, during working hours, the employees were assembled at respondent's warehouse (R. 47; 112, 181, 211–212). Superintendent McIsaac informed them that the purpose of the meeting was to permit representatives of the Teamsters to address them (R. 47; 181–

[13] The discriminatory discharge of Cedar will be discussed below (infra, pp. 11–12).

182). McIsaac then turned the meeting over to the Teamsters, and both Superintendent McIsaac and Assistant Superintendent Stewart remained at the meeting, while the Teamsters' representatives addressed the employees (R. 47–48; 113, 182). King, one of the Teamsters' representatives who had formerly been an official of Local 22382 (R. 47; 116, 146, 183), spoke to the employees, and after outlining the reasons for his own change in affiliation and the benefits to be derived from joining the Teamsters, asked the employees when they were going to sign up with the Teamsters (R. 47–48; 114–115, 183). Torreano, another Teamsters' representative, spoke along the same lines (R. 48; 183). After the speeches, the five Teamsters' representatives who had attended the meeting circulated among the assembled employees, exhorted them to join the Teamsters, solicited each one individually, and succeeded in inducing 13 employees to sign membership application cards (R. 48; 116–117).

That same afternoon the Teamsters presented the 13 signed application cards to respondent in confirmation of its status as the bargaining representative of the employees and demanded that a contract be signed (R. 48; 184, 210). Respondent refused to sign on the ground that the Teamsters had not shown that they represented a majority of the 26 employees at the plant (*ibid.*). A few days later, the Teamsters met this objection by producing three or four additional signed application cards (*ibid.*). After checking the validity of the signatures on all the application cards, respondent, on May 18, 1945, entered into an agree-

ment with the Teamsters, recognizing that union "as the sole collective bargaining agent for all the employees of the Employer covered by the master agreement" (R. 48; 20–21, 189, 210–211). Shortly thereafter, respondent again assembled its employees in the plant, and Superintendent McIsaac informed them that a contract had been signed with the Teamsters, that respondent would henceforth be bound by the contract, and that "it was too late now to do anything about it" (R. 49–50; 122, 211–212). Respondent did not show the contract to the employees at this time, but allowed the Teamsters' representatives to do so at another meeting held a few days later at respondent's warehouse (R. 50; 118–121, 208, 212–213). At the latter meeting the Teamsters' representatives were again granted permission to talk to the employees, and did so in the presence of Superintendent McIsaac and Assistant Superintendent Stewart, this time during a rest period (R. 50; 119–120, 208, 212). On this occasion, the Teamsters' representatives remarked that some of the employees had not yet signed up with the Teamsters, and warned the employees, "If you boys don't sign up, you will be all sitting out in the park because this plant is going to be closed" (R. 50; 121). After the meeting the Teamsters' representatives again circulated among the employees and solicited them individually (R. 50, 51; 121). And when Employee Cedar said that he did not intend to do anything "right now" about joining the Teamsters, he was told, "Well, either you sign up or else * * * You know, out you go" (*ibid.*).

4. The discriminatory discharge of Gus Cedar

Neither respondent nor the Teamsters dispute the validity of the Board's finding, adopting that of the Trial Examiner, that respondent discharged Cedar on June 22, 1945, because of his refusal to join the Teamsters (R. 34, 50–53).[14] The detailed findings are as follows

Since June 1944, Cedar had been a "regular" employee in the boiler room and a member in good standing of Local 22382 (R. 50–51; 100–101, 107, 128, 137–138, 141). When the Teamsters' representatives, with respondent's permission, were soliciting the employees in the plant during working hours in May 1945 (*supra,* pp. 8–10), Cedar was solicited and, finally, was warned by the representatives to "either sign up or else * * * out you go" (*supra,* p. 10). In the latter part of May, Superintendent McIsaac warned Cedar that his refusal to join the Teamsters was "causing me to have to let you go" (R. 51–52; 124, 193). On June 22, 1945, while he was working in the plant, Cedar was approached by two Teamster representatives who asked what his intentions were as to signing up (R. 52; 102–103). When Cedar replied that he was not going to join the Teamsters, one of the representatives told him he was fired and to report to the office for his time (*ibid.*). When Cedar reported to respondent's office, he was given a termination notice which stated that he was discharged because of his

[14] As we have noted (*supra*, p. 3), respondent filed no exceptions to the Intermediate Report of the Trial Examiner, and the Teamsters did not except to this finding.

"Refusal to join Union (A. F. of L.) Teamsters" (R. 53; 103–104, 106). At the time of the hearing, Cedar had not worked for respondent since his discharge (R. 53; 154).

B. The Board's decision and order

Upon the foregoing facts, and upon its finding that respondent did not have a closed-shop contract with the Teamsters (R. 33, 59–61), the Board found that respondent rendered assistance to the Teamsters, in violation of Section 8 (1) of the Act (R. 33, 54–55), and discriminatorily discharged Employee Cedar, in violation of Section 8 (3) and (1) (R. 34, 61.) The Board's order requires respondent to cease and desist from the unlawful conduct in which it has engaged and, affirmatively, to offer Cedar reinstatement with back pay, and to post in its plant appropriate notices of compliance with the Board's order (R. 35–38).

SUMMARY OF ARGUMENT

The Board properly found that respondent rendered assistance to the Teamsters and discharged Employee Cedar because he refused to join the Teamsters, at a time when respondent did not have a closed-shop contract with the Teamsters, and that, therefore, respondent's conduct was in violation of Sections 8 (1) and (3) of the Act.

1. The terms of the Master Agreement did not condition employment upon union membership.

2. The other contentions of respondent and the Teamsters are without merit.

ARGUMENT

The Board properly found that respondent rendered assistance to the Teamsters and discharged Employee Cedar because he refused to join the Teamsters, at a time when respondent did not have a closed-shop contract with the Teamsters, and that, therefore, respondent's conduct was in violation of Section 8 (1) and (3) of the Act

Upon this record there is, of course, no question but that respondent rendered assistance to the Teamsters. The Board's findings that respondent assembled its employees in the plant during working hours for the purpose of permitting Teamster representatives to address the employees and solicit them to join the Teamsters, and that respondent itself, through its top representatives at the plant, urged the employees to join the Teamsters and warned them that they faced a plant shutdown and resultant unemployment unless they did so, are supported by unassailable evidence (*supra,* pp. 7–10). And the propriety of the Board's further finding that respondent discharged Employee Cedar because he refused to join the Teamsters is, apparently, conceded by the parties (*supra,* pp. 3, 11). In any event, the latter finding is not open to attack before this Court, because neither respondent nor the Teamsters excepted to the identical finding by the Trial Examiner (R. 27–30, 34, 50–53, 61).[15]

It goes without saying, furthermore, that unless respondent had a closed-shop contract with the Teamsters at the time of its acts of assistance to the union,

[15] *N. L. R. B.* v. *Cheney California Lumber Co.*, 327 U. S. 385, 388–389; *Marshall Field & Co.* v. *N. L. R. B.*, 318 U. S. 253, 255; *N. L. R. B.* v. *Kinner Motors, Inc.*, 154 F. 2d 1007 (C. C. A. 9); *N. L. R. B.* v. *Cutler*, 158 F. 2d 677 (C. C. A. 1).

including the discriminatory discharge of Employee Cedar, respondent's conduct was in violation of Section 8 (1) and (3) of the Act, as the Board found (R. 32–34). *N. L. R. B.* v. *Electric Vacuum Cleaner Co., Inc.,* 315 U. S. 685, 692–695; *N. L. R. B.* v. *Waterman Steamship Corporation,* 309 U. S. 206, 211–213; *N. L. R. B.* v. *Mason Mfg. Co.,* 126 F. 2d 810, 813–814 (C. C. A. 9); *N. L. R. B.* v. *Graham Ship Repair Co.,* 159 F. 2d 787, 788 (C. C. A. 9); *South Atlantic Steamship Co.* v. *N. L. R. B.,* 116 F. 2d 480, 481, 482 (C. C. A. 5), certiorari denied, 313 U. S. 582; *N. L. R. B.* v. *John Englehorn & Sons,* 134 F. 2d 553, 557–558 (C. C. A. 3).

In these circumstances, the single issue in this case is whether the Master Agreement, which was the agreement relied upon by respondent in defense of its conduct (*supra,* p. 2), was a closed-shop agreement or, in the language of the proviso to Section 8 (3) of the Act, whether it required of respondent's employees membership in the Teamsters "as a condition of employment."[16] As we have suggested above

[16] Section 8 (3) of the Act makes it an unfair labor practice for an employer "By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *." The proviso to Section 8 (3) allows the following exception to this proscription: "*Provided*, That nothing in this Act * * * shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a) in the appropriate collective bargaining unit covered by such agreement when made."

(*supra,* p. 2), this question is identical with one of the questions posed by *N. L. R. B.* v. *G. W. Hume Company, et al.,* No. 11693, now before this Court. Insofar as the question involves an interpretation of the language of the Master Agreement, therefore, our argument here is the same as that made in our brief in the *Hume* case (Board Br., pp. 24–32). For the convenience of the Court and the parties, however, we shall repeat the argument here.

1. The terms of the Master Agreement did not condition employment upon union membership

The portions of the Master Agreement (*infra,* pp. 29–55) which deal with the matters of hiring practices and the employer's obligations in connection with the union membership status of his employees are as follows (*infra,* pp. 31–35):

> SECTION 3. PREFERENCE OF EMPLOYMENT AND HIRING PRACTICES.
>
> (a) It is recognized that the refusal of Union members to work with non-union employees who are within the jurisdiction of the local union shall not constitute a violation of this agreement, provided, however, that before any strike action, job action, or other direct action is taken on this account, the local Union will submit the matter for adjustment as provided in Section 8 hereof.[17] In order to aid in the prompt adjustment of such matters, the Union shall furnish its members with a clearance card, dues book or other evidence of paid-up

[17] Section 8 establishes the grievance procedure and provides for the ultimate disposition of grievance questions by arbitration if necessary (*infra,* pp. 35–38).

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membership, and *when employees who are on the seniority lists, as defined in Section 9 hereof,*[18] *are called to work, the Employer will request that such evidence be presented by those who have it, and will keep a record, which will be available to the Union, of all employees who do not present such evidence.* Similarly the Union will from time to time, when such information is available, notify the Employer of the names of delinquent or suspended members, or other nonunion employees, according to Union records.

The Employer shall be the sole judge of the qualifications of all its employees, subject to appeal as provided in Section 8 hereof, but in the selection of *new employees* the Employer will give *preference* of employment *to unemployed members of the local union,* provided

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[18] Section 9 relates to the establishment of a seniority roster and provides, in part, as follows (*infra*, pp. 39–40):

"(b) All jobs shall be filled and rehiring shall be from the regular list in the order of seniority, and thereafter all vacancies in positions of regular and seasonal employment shall be filled from the seasonal list in the same order * * *. Similarly, lay-offs for lack of work shall be made in the reverse order of seniority * * *.

"In rehiring new employees, the procedure and preferences provided in Section 3 hereof shall be followed * * *.

* * * * *

"(d) In each plant employees shall be divided into two (2) groups as follows: Regular employees and seasonal employees, all to be listed on one seniority roster for said plant.

"(e) Regular employees are those who have worked in a given plant at least forty (40) weeks out of the fifty-two (52) weeks during the preceding calendar year.

"Seasonal employees are those other than regular employees who worked in a given plant at least sixty (60) percent of the total number of operating days of said plant during the previous season."

they have the necessary qualifications and are available when new employees are to be hired. "New employees," for the purpose of this agreement, are defined to be persons who are not on the seniority list of the hiring plant, as defined in Section 9 hereof, even though they may have been employed previously by said plant. As a basis for preferential consideration as new employees as aforesaid, unemployed members of the local union shall be required to present a clearance card from the local union evidencing the fact of their paid-up membership. [If such union members are not available for such employment, the Employer may hire any person not a member of the Union provided that such person will be required to file an application for membership in the local union before being put to work. Upon filing such application he shall receive from the Union a written statement that he has made such application, which statement shall be taken up by the Employer and returned to the Union when the applicant is put to work. It is further understood that such person must become a member of the local union within ten (10) days after his employment, and that the local union will not unreasonably refuse to accept such person as a member.][19] [Italics added.]

Subsection (b) of Section 3 of the Agreement provides for the mechanics of carrying out the foregoing

[19] The matter in brackets was modified on or about July 10, 1943, due to the then existing manpower shortage, to permit the canneries to hire during the 1943 canning season "emergency workers" who, however, had to file an application for membership in the local union of the Council or obtain an "emergency card" therefrom before being allowed to work (*infra*, pp. 32, 50–51).

and requires the contracting local union to have a representative available in the plant to receive the applications from new employees (*infra,* pp. 32–35). In this subsection "the local union agrees to assume responsibility for completing the matter of subsequent affiliation by such new workers as members of the Union" (*infra,* p. 35).

Section 3 of the Agreement, as its title suggests, focuses upon the proposition that the employer will give *preference* to union members in hiring *new* employees. Nothing in the Agreement so much as suggests that *old* employees, that is, employees on the seniority list,[20] are required, as a condition of continued employment, either to join the A. F. L. or to maintain their memberships if they had joined in the past. The only provision in the Agreement requiring union membership of *any* employee is the second paragraph of Section 3 (a) which provides (1) that unemployed members of a local must show a clearance card "evidencing the fact of their paid-up membership" before they are eligible for "preferential consideration as new employees" (*supra,* p. 17), and (2) that a new non-union member employee, hired to fill a job for which a union member was not available, "must become a member of the local union within ten (10) days after his employment" (*ibid.*). Even these provisions affecting new employees, however, do not require such employees to *maintain* their union membership in the future as a condition of continued employment.

[20] As shown above (*supra,* pp. 7–11), Employee Cedar, whose discriminatory discharge is involved herein, was a "regular" employee.

The provision in Section 3 (a) of the Agreement that a refusal on the part of union members "to work with non-union employees * * * shall not constitute a violation of this agreement," is the only portion of this section of the Agreement applicable to employees on the seniority list (*infra,* p. 31).[21] And there is absolutely no indication therein that such employees are required to join, or maintain membership in, the union as a condition of employment. The provision does nothing more than preserve to union members the right to strike in protest against being required to work with non-union employees, and to do so without having such strike action constitute a violation of the Master Agreement. And even this right is qualified by the proviso that any dispute in this connection must be submitted for adjustment through the contractual grievance procedure, before any direct action may be taken by the union or its members. "In order to aid in the prompt adjustment of such matters," the Agreement provides that the union will furnish all its members with a clearance card "or other evidence of paid-up membership," and that the employer, upon recalling to work employees "who are on the seniority lists," will report to the union all such employees who do not present evidence of union clearance. Presumably as a cross-check to keep the records straight, the Agreement provides also that the union will, in turn, inform the employer of delinquent or suspended members.

[21] If the Master Agreement were truly a closed-shop contract, this provision clearly would be meaningless, for no employees who were not members of the union would be permitted to work in the plant.

This is a far cry from an agreement providing for the maintenance of a closed-shop. Whatever else these terms of the Agreement may stand for, they certainly do not provide that employees on the seniority list must maintain membership in the union or else be subject to discharge from their jobs.

The fact that the terms of the Master Agreement do not make continued employment of employees on the seniority list contingent upon union membership is, we submit, decisive of the propriety of the Board's finding that respondent violated Section 8 (1) and (3) of the Act when it discharged Employee Cedar because he refused to join the Teamsters, and otherwise rendered assistance to the Teamsters.

The proviso to Section 8 (3) of the Act (*supra,* p. 14, n. 16) permits such discrimination against employees only where the employer and the union properly representing his employees have an agreement which makes union membership "a condition of employment." *Matter of Iron Fireman Manufacturing Co.,* 69 N. L. R. B. 19, 20–21. The proviso is, in short, an exception to the statute's broad proscription of employer discrimination against employees because of their union affiliations or activity and, as such, is to be narrowly and strictly construed.[22] As the Supreme Court has declared, "These words of the exception must have been carefully chosen to express the precise

[22] The cases abound which lay down the fundamental principle that such a proviso must be strictly construed and that one seeking to come within the exception must comply strictly with the words as well as the reason for the proviso. See, e. g. *Hartford Electric Light Co.* v. *Federal Power Commission*, 131 F. 2d 953, 962 (C. C. A. 2), certiorari denied, 319 U. S. 741; *Great Atlantic &*

nature and limits of permissible employer activity in union organization" (*N. L. R. B.* v. *Electric Vacuum Cleaner Co., Inc.*, 315 U. S. 685, 695). The Congressional purpose in including the proviso in the Act was not to "favor," "facilitate," or give "special legal sanctions" to closed-shop arrangements between unions and employers (Report of the Senate Committee on Education and Labor, 74th Cong., 1st Sess., S. Rep. No. 573, pp. 11–12).[23] The purpose was simply to *permit* the making of a "traditional * * * closed-shop agreement" within the bounds of the basic policies of the Act (S. Rep., pp. 12, 13). The Board and the courts, therefore, have read the proviso, not in isolation, but in conjunction with the Act as a whole, and have held, indeed, that even employer discrimination which might appear to be protected by the letter of the proviso is not permissible where it would result in a denial to employees of the fundamental freedom to select representatives, and the protection against discrimination, which the Act as a whole was designed to afford. *Wallace Corporation* v. *N. L. R. B.*, 323 U. S. 248, 256; *Local 2880* v. *N. L. R. B.*, 158 F. 2d 365, 368–369 (C. C. A. 9),

Pacific Tea Co. v. *Federal Trade Commission*, 106 F. 2d 667, 674 (C. C. A. 3), certiorari and rehearing for certiorari denied, 308 U. S. 625, 309 U. S. 694; *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52, 56 (C. C. A. 8); *U. S.* v. *Dickson*, 40 U. S. 141, 164–165; *Canadian Pac. Ry. Co.* v. *U. S.*, 73 F. 2d 831, 834 (C. C. A. 9); *Rochester Telephone Corporation* v. *U. S.*, 23 F. Supp. 634, 636 (D. C. N. Y.), affirmed 307 U. S. 125; *Spokane & Inland R. R.* v. *U. S.*, 241 U. S. 344, 350; *Thomas Basham Co.* v. *Lucas*, 21 F. 2d 550, 551 (D. C. Ky.), affirmed 30 F. 2d 97 (C. C. A. 6).

[23] To the same effect, H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 19–20.

certiorari granted, 65 S. Ct. 1305; *N. L. R. B.* v. *American White Cross Laboratories, Inc.*, 160 F. 2d 75, 77 (C. C. A. 2). In the instant case, where even the *letter* of the proviso was not satisfied (*supra*, pp. 15–20), it follows *a fortiori* that respondent can find no protection in the proviso either for the discrimination in which it has engaged, or for its other acts of assistance to the Teamsters.

2. The other contentions of respondent and the Teamsters are without merit

Respondent is in no way aided by its contention that, even if the language of the Master Agreement did not condition employment in its plant upon union membership, the parties to the contract administered it *as if* it did so. The Board properly rejected this contention as "not supported by the evidence" (R. 34, n. 3). Other than the bare statement of respondent's witness, Superintendent McIsaac, that while respondent was under contract with Local 22382 "employees coming under * * * [the Master Agreement] were required to maintain good standing" in that union (R. 174–175, 197), there is no evidence that the parties administered the Agreement as a closed-shop contract. And McIsaac admitted that, prior to Cedar's discharge in June 1945, no employee had ever been discharged for failure to maintain union membership (R. 198, 219). Employee Cedar, the only other witness herein, testified that prior to respondent's recognition of the Teamsters in May 1945, all of respondent's employees, including himself, were members of Local 22382, but that he was not aware

of any *requirement* that respondent's employees join or maintain membership in Local 22382 (R. 137–138, 141–142).

In view of the considerations discussed above (*supra*, pp. 20–22), it clearly would be against everything the Act stands for to strain the terms of the Agreement and the conduct of the parties thereto, in order to wring out a construction which would excuse the interference and discrimination worked upon respondent's employees. Certainly upon this record the Board would not have been warranted in giving serious consideration to the claim that the conduct of the parties to the contract herein established the Master Agreement as a closed-shop agreement, even though its written terms failed to do so. There simply is no evidence of such alleged conduct in the record.[24]

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[24] In any event, in view of its unmistakably clear terms, the requirements of the Master Agreement could not be explained away or altered by reference to the conduct of the parties following its execution. It is elementary that, "if the meaning of the contract is plain, the acts of the parties cannot prove an interpretation contrary to the plain meaning" (3 Williston, *Contracts*, Rev. Ed., Sec. 623, pp. 1793–1794. *South Atlantic Steamship Co.* v. *N. L. R. B.*, 116 F. 2d 480, 482 (C. C. A. 5), certiorari denied, 313 U. S. 582), and that "The fact that the parties followed a different plan cannot work a revocation of the plain agreement" (*In re Chicago & E. I. Ry. Co.*, 94 F. 2d 296, 299 (C. C. A. 7)). *Railroad Co.* v. *Trimble*, 77 U. S. 367, 377; *Dant & Russel, Inc.* v. *Grays Harbor Exportation Co.*, 106 F. 2d 911, 912 (C. C. A. 9); *Lesamis et al.* v. *Greenberg*, 225 Fed. 449, 451–452 (C. C. A. 9); *Alaska Treadwell Gold Mining Co., et al.* v. *Alaska Gastineau Mining Co.*, 214 Fed. 718, 727 (C. C. A. 9), modified as to another point, 221 Fed. 1019 (C. C. A. 9), certiorari denied, 238 U. S. 614; *Hutchinson Gas & Fuel Co.* v. *Wichita National Gas Co.*, 267 Fed. 35, 46 (C. C. A. 8).

We submit, therefore, that with respect to both the written terms of the Master Agreement and the parties' understanding and administration of the agreement, respondent has failed to sustain its "burden of proof of a closed-shop agreement." *N. L. R. B.* v. *Mason Mfg.*, 126 F. 2d 810, 813 (C. C. A. 9).

The further contention that the Board, in the course of the proceedings in the *Bercut-Richards* case (*supra*, p. 5, n. 10), determined that the Master Agreement was a closed-shop agreement, is likewise without merit.

In its Supplemental Decision in the *Bercut-Richards* case (65 N. L. R. B. 1052) the Board, referring to the Master Agreement, stated that (*id.* at pp. 1057–1058):

> * * * No legal effect may be given the closed-shop provision contained in the current collective agreements after their expiration date * * *.

But the *Bercut-Richards* case, unlike the instant case, did not involve an unfair labor practice. It was a representation proceeding under Section 9 of the Act. The only issue before the Board in that case was whether the objections to the elections held by the Board were valid and warranted an order setting the elections aside. The case involved no question as to whether or not the Master Agreement was a closed-shop contract and the Board had no occasion to pass upon, or to weigh fully the considerations determinative of, that question. It is specious, therefore, to argue that the Board's passing reference to a

"closed-shop provision" in the Agreement represented a commitment by the Board or a prejudgment of that question, should it ever arise, as it has now, in a subsequent unfair labor practice proceeding. Actually the statement in the *Bercut-Richards* decision was merely part of an admonition to the employers there involved that, while the representation question in that case was pending before the Board, they should avoid any acts of recognition or assistance to any labor organization. The Board's use of the phrase "closed-shop provision" was clearly nothing more than a broad non-technical reference to the union-membership provisions in the preferential hiring section of the Master Agreement. As the Board observed in its decision in the *Hume* case (71 N. L. R. B. 553, 557) the parties in the *Bercut-Richards* proceeding had similarly used the term "closed shop" to describe contractual membership requirements generally. Moreover, since the discharge herein was made prior to the issuance of the *Bercut-Richards* decision, respondent could not have relied upon the Board's statement therein, or have been misled by it.[25]

CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence, that its order is

[25] The Board's Supplemental Decision in the *Bercut-Richards* case was issued on February 15, 1946 (65 N. L. R. B. 1052). The discriminatory discharge of Employee Cedar herein occurred on June 23, 1945 (*supra*, pp. 11–12).

valid,[26] and that a decree should issue enforcing the order in full.

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DECEMBER 1947.

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[26] We have noted (*supra*, p. 3) that respondent filed no exceptions to the Trial Examiner's Intermediate Report which included a recommended order (R. 65–70). The Board's order consists of an adoption of certain portions of the order recommended by the Trial Examiner (R. 35–38, 65–70). The only portion of the order, as adopted by the Board, to which the Teamsters filed exceptions was the requirement that the notice to be posted by respondent state that respondent will not "in any manner encourage or coerce" its employees to become or remain members of the Teamsters "or any other labor organization, whether or not because of pressure from that or any other organization, or because of other economic considerations" (R. 30, 37–38, 69). Upon this state of the record the propriety of the other portions of the Board's order is not now open to review. *N. L. R. B.* v. *Cheney California Lumber Co.*, 327 U. S. 385; *N. L. R. B.* v. *Kinner Motors, Inc.*, 154 F. 2d 1007 (C. C. A. 9); *N. L. R. B.* v. *Van de Kamp's Holland Dutch Bakeries*, 154 F. 2d 828 (C. C. A. 9). In any event, the validity of the order on the findings made, including the notice provision excepted to by the Teamsters, is well established. *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265, 268; *Phelps-Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 187–189, 197; *Int'l Ass'n of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 75, 81–83; *N. L. R. B.* v. *Express Publishing Co.*, 312 U. S. 426, 438, 439.

APPENDIX A

The relevant portions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (3) By discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, * * * shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.
>
> * * * * *
>
> SEC. 10. * * *
>
> (c) * * * If * * * the Board shall be of the opinion that any person * * *

has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order * * *. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

APPENDIX B

BOARD'S EXHIBIT No. 4, in "MATTER OF G. W. HUME COMPANY, ET AL."

COLLECTIVE BARGAINING AGREEMENT BETWEEN CALIFORNIA PROCESSORS AND GROWERS, INC., AND THE AMERICAN FEDERATION OF LABOR AND CALIFORNIA STATE COUNCIL OF CANNERY UNIONS AS ADOPTED JUNE 10, 1941, AMENDED JANUARY 26, 1942, AMENDED JULY 10, 1943.

AGREEMENT

This Agreement made and entered into this 10th day of June 1941 (as amended January 26, 1942 and July 10, 1943) by and between California Processors and Growers, Inc., as collective bargaining agent for and on behalf of those canning companies, each of which is hereinafter called the Employer, and which by written statement attached to this agreement or specifically referring to this agreement, adopt this agreement and promise to be bound thereby, and the American Federation of Labor and California State Council of Cannery Unions, as collective bargaining agents for and on behalf of those Cannery Workers Unions, chartered by the American Federaton of Labor, each of which is hereinafter called the Union, and which by written statement attached to this agreement or specifically referring to this agreement, adopt this agreement and promise to be bound thereby.

Witnesseth: That in consideration of the premises it is mutually agreed as follows:

Each and every, all and singular of the obligations and provisions of said collective-bargaining agree-

ment dated June 10, 1941, as amended January 26, 1942, are hereby ratified and confirmed, without variation or modification of any kind or character, except as specified in the amendments hereinafter set forth and in the "Supplementary Emergency Agreement" of even date herewith.

SECTION 1. Recognition. The Employer through its representative, California Processors and Growers, Inc., hereby agrees to recognize the Union through its representatives, California State Council of Cannery Unions and the American Federation of Labor, as the sole agency representing its employees for the purpose of collective bargaining. There shall be no discrimination of any kind against any employees on account of union affiliation or on account of bona fide union activity of such persons.

SECTION 2. Operation of Agreement. In addition to the operation of this master contract as an agreement between the collective bargaining agents of the Employers and the Unions above described, this contract shall operate as a direct agreement between individual Employers and individual local Unions as to named canning plants and named local Unions, upon the execution of the attached forms of certificate setting forth the name of the Employer, the location of the plant, and the name and charter number of the Union concerned. The execution of such certificates shall bind the individual Employers and individual Unions mutually concerned, for the plants and for the membership of the local Unions so named, as follows: The Employer will pay the wages herein specified and perform the agreements on its part as hereinafter set forth, and the Union, through its membership, will do the work herein described and perform the agreements on its part as hereinafter set forth, each without limitation or reservation except as expressed hereinafter.

SECTION 3. Preference of Employment and Hiring Practices.

(a) It is recognized that the refusal of Union members to work with non-union employees who are within the jurisdiction of the local Union shall not constitute a violation of this agreement, provided, however, that before any strike action, job action or other direct action is taken on this account, the local Union will submit the matter for adjustment as provided in Section 8 hereof. In order to aid in the prompt adjustment of such matters, the Union shall furnish its members with a clearance card, dues book or other evidence of paid-up membership, and when employees who are on the seniority lists, as defined in Section 9 hereof, are called to work, the Employer will request that such evidence be presented by those who have it, and will keep a record, which will be available to the Union, of all employees who do not present such evidence. Similarly the Union will from time to time, when such information is available, notify the Employer of the names of delinquent or suspended members, or other non-union employees, according to Union records.

The Employer shall be the sole judge of the qualifications of all of its employees, subject to appeal as provided in Section 8 hereof, but in the selection of new employees the Employer will give preference of employment to unemployed members of the local union, provided they have the necessary qualifications and are available when new employees are to be hired. "New Employees", for the purpose of this agreement, are defined to be persons who are not on the seniority list of the hiring plant, as defined in Section 9 hereof, even though they may have been employed previously by said plant. As a basis for preferential consideration as new employees as aforesaid, unemployed mem-

bers of the local union shall be required to present a clearance card from the local union evidencing the fact of their paid-up membership. [If such union members are not available for such employment, the Employer may hire any person not a member of the Union provided that such person will be required to file an application for membership in the local union before being put to work. Upon filing such application he shall receive from the Union a written statement that he has made such application, which statement shall be taken up by the Employer and returned to the Union when the applicant is put to work. It is further understood that such person must become a member of the local union within ten (10) days after his employment, and that the local union will not unreasonably refuse to accept such person as a member.] [1]

(b) The following rules and practices shall govern in carrying out the foregoing provisions of this Section relating to preferential employment and to hiring new employees:

(1) A central authority, responsible for hiring and firing, shall be established and maintained in each plant of the employer which, under Section 2 hereof, is subject to the provisions of this agreement. Such plants shall be known as "member plants". Each member plant shall furnish the appropriate local union and the California Processors and Growers, Inc., with the name of the person assigned by such member plant to the responsibility of acting as such central authority.

The person assigned to the responsibility of acting as such central authority shall have full authority for hiring and firing and shall be

[1] Matter in brackets is modified by Section 1 of the Supplementary Emergency Agreement. See page 35. [*infra*, pp. 50–51].

available at all proper times to carry out the purposes of this agreement, and the Employer agrees that the person so assigned shall not have conflicting duties which will interfere with his availability.

(2) At the beginning of the operating season for processing perishable products, whether fruits or vegetables, and upon the resumption of operations during such operating season after any shut down lasting two weeks or more, the respective member plants of the Employer will give the local union office written notice of beginning or resuming operation equivalent in time to that given to registered workers on the seniority list of such plants, and at least 48 hours before such operations start provided such information is available to the Employer in time to fulfill this requirement. In case of a shut down of less than two weeks, the local union office will be given the same length of notice of resumption of work as that given to employees of the plant concerned. Information concerning the probable or actual termination of any operating season, and of shut downs for substantial periods of time during such season, will be furnished to the local Union by the Employer when and to the extent that such information is available. In the event that an Employer gives notice that no further processing operations are to be undertaken after the completion of operations on any particular product in a given season, and employees are thereafter laid off for lack of work, any such employees having seniority who are subsequently recalled to work in said plant during said season on account of the resumption of processing operations, and who fail to report, shall not lose their seniority rights as provided in 9 (h) hereof, but shall be deemed to have a reasonable excuse for such failure to report.

(3) During the operating season, and at the beginning of each work shift or day, the local

union undertakes to have available, at member plant subject to this agreement, sufficient qualified members of the appropriate local union to fill normal vacancies. If such members are not available at such plants, other persons may be hired as herein provided.

(4) During any day or shift, if there is an increase in volume of work which necessitates the hiring of five or more additional employees, the local union will be given at least two hours' notice of such need, to enable said union to make available sufficient qualified local union members, before other persons are hired as herein provided. To aid in the practical application of this provision and to avoid unnecessary calls at night, the local union will furnish the appropriate central hiring authority, in plants operating night shifts, with a list of currently available local union members whenever possible to do so.

The foregoing procedure shall apply during the operating season for processing perishable products, whether fruits or vegetables, and shall likewise apply during the non-processing season with the exception that during such portion of the year the procedure shall apply to the hiring of any or all additional employees, rather than to "five or more additional employees" as provided during the processing season.

(5) Each local union will provide a practical method for receiving notices herein provided, and Employer will be released from obligation under these rules if notice is given but not availed of by the local union concerned, or if no one is reasonably available to receive notice.

(6) When hiring "new employees" (as defined in Section 3 (a) hereof) if qualified members of the appropriate local union are not available, the Employer will require applicants for work to follow the procedure described in

Section 3 (a) hereof before being put to work, and will advise such applicants of the provision of this Section requiring affiliation with said union within ten (10) days after actual employment. The local union agrees to have a representative available for receiving union applications at times designated by the member plant central hiring authority for employing new workers, and the local union agrees to assume responsibility for completing the matter of subsequent affiliation by such new workers as members of the Union.

* * * * *

Section 8. Adjustment of Grievances. Grievances arising in any plant covered by this contract will be reported in writing to the shop committee and/or local business agent. If no satisfactory settlement can be reached with the plant management, the Union, through its Executive Board, will turn over the matter to the Adjustment Board hereinafter provided.

The Employer shall have an equal right to present grievances to the Shop Committee, and/or local business agent, and if adjustment through the local union fails, to present any unsettled matters to the Central Adjustment Board.

A Central Adjustment Board will be set up promptly with the signing of this agreement. The members of this Board will be composed of six (6) Business Agents to be elected by the California State Council of Cannery Unions, four (4) of which are to be regulars and two (2) to act as alternates. There shall be at least one (1) woman union representative serving on the Adjustment Board at all times. The California Processors and Growers, Inc., will set up a committee of like number to act with the Union committee. Any disputes or grievances that are referred to it as herein provided shall be decided by the Central Adjustment Board, and the decision of

that Board shall be final and binding on all parties concerned. The Adjustment Board must meet within three (3) days after being notified. In the event that this committee becomes deadlocked within three (3) days after meeting, then an outside person, mutually satisfactory, shall be called in to make the final decision. In any event, a final decision shall be made within nine (9) days after the original reference.

Nothing in this agreement shall be deemed to limit the right of the Employer to discharge an employee for cause, provided, however, that if an employee claims to have been unjustly discharged, suspended, or discriminated against in any manner during the life of this agreement his or her case shall be taken up by the employee with the Shop Committee and/or Business Agent within twenty-four (24) hours. If upon investigation the matter is not thus disposed of, the case may be referred to the executive committee of the Union, and an official of the Company; provided that written notice of such appeal shall be delivered forthwith by the appealing party to the other party. If these parties are unable to agree, the case may be appealed within forty-eight (48) hours after notice is given to the employee that no adjustment has been made. The appeal shall be to the Adjustment Board hereinabove provided for in the same manner and with the same effect as set forth for the adjustment of other matters provided in this section. In case a discharge is found to be unjustifiable by the Adjustment Board, the Board may order payment for lost time or reinstatement with or without payment for lost time. In cases of demotion and discharge of employees on the seniority lists for lack of qualifications or ability to perform a job, the Employer will notify the Union before action is taken, whenever time and circumstances permit.

In addition to the power to adjust grievances referred to it by local unions or the Employer as hereinabove provided, and the determination of appeals in cases of contested discharge, the Adjustment Board shall have the power and responsibility to investigate and determine all matters arising under Section 3 (a) hereof relating to the refusal of union members to work with nonunion employees. In all such cases notice of the existence and nature of such dispute shall be submitted in writing to California Processors and Growers, Inc., by the local union, in addition to presentation to the Shop Committee and/or local business agent as hereinabove provided.

The specific provisions of this section shall not be construed to limit the kind of grievances that may be submitted for adjustment, nor shall the provisions of Section 15 (d) hereof be construed as a limitation of power.

In addition to meetings called to consider specific disputes as herein provided, the General Adjustment Board shall meet at least once a month, or at other times determined by mutual agreement of the members thereof, for the purpose of considering any matters, in addition to the adjustment of grievances presented by any party hereto, that may relate to the interpretation or administration of the provisions of this agreement. All decisions of said Board in adjusting grievances, and all determinations of said Board relating to the interpretation or administration of this agreement shall be reduced to writing and shall be sent to each local union and to each Employer, party to this agreement. Adjustments or interpretations made in settlement of local disputes prior to submission to the Board shall not be binding upon the Central Board, but any adjustment or interpretation made

by the Central Board shall be binding on all parties hereto.

Nothing in this section shall be construed to empower the Central Adjustment Board to change, modify, or amend the provisions of this agreement.

It is further understood that no member of the Central Adjustment Board will act as a Board member in cases concerning his own company, or his own local union, as the case may be.

Any expense voted by this Board will be borne equally by both parties to this agreement.

Pending decision of this Board, there shall be no cessation of work by the employees.

SECTION 9. Seniority.

(a) A seniority list shall be prepared for each plant, party to this agreement, and said list shall be prepared and presented to the appropriate local union within thirty (30) days after the signing of this agreement and thereafter said list shall be prepared and submitted to said Union within 30 days after the effective date of the contract in each succeeding year. Upon submission of said list to the local union, a copy or copies shall be posted by the Employer in a conspicuous place in the cannery concerned for inspection by employees, together with a notice that any requests for correction or modification of said list by employees or the local union must be made within a specified period of time. Such period of time, and similar periods for subsequent determination of seasonal lists, shall be fixed by mutual agreement between the Employer and the local union, or if no agreement is reached, by the Central Adjustment Board. After such notice, and the expiration of said period, no requests for change or modification of said lists will be considered. Said list shall be based on the beginning date, as accurately as can be deter-

mined, of continuous regular employment or consecutive seasonal employment, as the case may be, as such employment is hereinafter defined. All employees covered by this agreement and referred to in Section 4 (a) hereof shall be named on said list.

(b) All jobs shall be filled and all rehiring shall be from the regular list in the order of seniority and thereafter all vacancies in positions of regular and seasonal employment shall be filled from the seasonal list in the same order, provided that the person or persons having seniority are capable of performing in a manner satisfactory to the Employer the work which is available, provided, however, that a right of appeal shall exist as provided in Section 8 hereof. Similarly, lay-offs for lack of work shall be made in the reverse order of seniority, due consideration being given to the ability of the employee laid off and of the remaining employees to perform the work available in a manner satisfactory to the Employer, subject to the right of appeal as provided in Section 8 hereof.

In hiring new employees, the procedure and preferences provided in Section 3 hereof shall be followed, with the understanding that after the provisions of said Section 3 have been fulfilled, local residents will be given prior consideration in new employment.

(c) The relative position of said workers on said list in the respective groups hereinafter described shall be determined by length of service computed in the manner herein set forth.

(d) In each plant employees shall be divided in two (2) groups as follows: Regular employees and seasonal employees, all to be listed on one seniority roster for said plant.

(e) Regular employees are those who have worked in a given plant at least forty (40) weeks out of the fifty-two (52) weeks during the preceding calendar year.

Seasonal employees are those other than regular employees, who worked in a given plant at least sixty percent (60%) of the total number of operating days of said plant during the previous season.

An operating day is hereby defined as either any day during which perishable products are being processed when not less than twenty percent (20%) of the average number of employees on the plant pay roll during the week of greatest employment during the season are at work, or any day during which not less than twenty percent (20%) of the average total daily pay roll during the week of greatest employment during the season is paid out.

(f) Any person on the regular or seasonal seniority list of a given plant at the beginning of the 1940 season shall be entitled to credit for prior service for seniority purposes on the following basis:

(1) For regular employees: one year's credit for each consecutive year prior to 1940, back to and including 1937, during which such employee worked forty (40) weeks or more in such plant during a calendar year; and one year's credit for each consecutive year prior to 1937 that such employee worked any portion of a calendar year in such plant.

(2) For seasonal employees: one year's credit for each consecutive year prior to 1940, back to and including 1937, during which such employee worked sixty per cent (60%) of the total actual operating days in such plant during a calendar year, as defined in the 1940 agreement; and one year's credit for each consecutive year prior to 1937 that such employee worked any portation of a calendar year in such plant.

Absence from the plant payroll for a total calendar year, except as provided in Section 9 (i) hereof, shall prevent the crediting of that year or any prior year for purposes of seniority hereunder.

Any employee, whether regular or seasonal, who was on the seniority list of a given plant at the beginning of the 1940 season shall not thereafter lose his or her seniority status for failure to qualify by working forty (40) weeks, if a regular, or sixty per cent (60%) of the operating days as herein defined, if a seasonal worker, provided such failure is due to lack of available work, which such worker is qualified to perform, unless such employee shall be off the payroll of such plant for a total calendar year, or has been on the pay roll of such plant for two consecutive years but without qualifying for seniority in either year. In the event any employee fails to qualify in a given year, but thereafter does qualify for seniority as herein provided, such employee upon such subsequent qualification shall be entitled to credit for the intervening year or years as herein specified, but not to exceed two consecutive years.

If a regular employee loses his place on the regular seniority list in the manner hereinabove set forth, he may claim a place on the seasonal list, not later than the following year, and will take his appropriate relative place on that list in accordance with his seasonal seniority. If a seasonal employee gains a place on the regular list by qualifying length of employment, he shall not lose his seniority rating on the seasonal list, but may reclaim this seasonal standing if laid off for lack of work as a regular employee.

(g) Any employee discharged for cause, or voluntarily quitting his or her employment, except in the case of lay-off for lack of work, or leave of absence with written consent, as provided in Section 9 (i), shall lose all seniority rights.

(h) Any person on the seniority list who is reasonably notified to report for work, and who fails to do so within a period of forty-eight (48) hours shall lose

all seniority rights, provided, however, that if said failure to report was excusable for reasons satisfactory to the Union and the Employer, such person shall lose only the immediate employment offered and shall be continued in his or her relative place on the seniority list. The employer will furnish the local union with a list of the persons who have failed to report for work after notification.

(i) When employees in plants covered by this contract are obliged to leave their cannery jobs because of acceptance by them of official positions with the Union, their seniority shall not be lost during such absence, but shall accumulate during such period in the same manner as if they remained employed in the status held by them before leaving, provided, however, that upon termination of their union position they notify the Employer within 30 days of such termination and shall then be eligible for reinstatement in accordance with the provision of Section 9 (b) hereof. All present officials of local unions, parties to this contract, shall be protected in their seniority status retroactively to cover the period of their incumbency as such union officials. Leaves of absence without loss of seniority for any other cause shall be granted only with the written approval of both Employer and the Union. Leaves of absence shall be granted for just cause, and approval shall not be withheld arbitrarily by the Employer or the Union. These provisions requiring written leave of absence shall not apply to absences, granted by the Employer for sickness or similar reasons, of less than ten (10) days duration.

(j) Notwithstanding the provisions of this section relating to seniority, when it is necessary to employ persons to perform supervisory duties or duties requiring special training or experience, and in the Employer's judgment it is necessary to select a person

regardless of seniority to fill such position, such person may be employed and assigned to any place of employment without regard to the seniority list, provided he is compensated at a wage higher than the minimum wage established for Bracket IV herein. Such employees shall receive such wage for any duties performed by them, whether in lower classification or not, so long as they are separately listed and employed without regard to the seniority list as herein provided. If persons named to such positions have a seniority rating based on prior service, they shall not lose said rating by reason of being separately listed, but may reclaim their seniority standing if laid off for lack of work on the type of assignment described herein. If such persons have no seniority rating based on prior service, however, they shall gain no seniority rights by reason of their employment under the provisions of this section. A copy of the lists of all such employees shall be furnished to the local union concerned, to the California State Council of Cannery Unions and to the California Processors and Growers, Inc. The Employer's judgment shall not be exercised arbitrarily, and any disputes arising hereunder shall be referred to the Central Adjustment Board as provided in Section 8 hereof.

(k) Any modifications to Section 9 shall be by mutual consent of the local union and an employer-canner party of this agreement. Any such modification shall be reduced to writing and a copy filed with the California Processors and Growers, Inc., and with the California State Council of Cannery Unions.

Section 10. Students. When an employer desires to put persons to work for the purpose of training them in a cannery job and not for the purpose of having them become permanent employees at such job, he may, without regard to the principle of seniority,

put such persons to work, but there shall not be more than one (1) such person per two hundred (200) employees or fraction thereof. Students will not be admitted to union membership and shall gain no seniority rights. The application of this section by the Employer shall be subject to review by the Adjustment Board as provided in Section 8 hereof. A list of students shall be furnished to the local union.

SECTION 11. Visits by Union Officials. The Employer agrees to admit to its plant at all reasonable times any authorized representative, or representatives, of the Union for the purpose of ascertaining whether or not this agreement is being observed by the parties hereto, and to assist in adjusting grievances. A duly authorized agent of the local union will be permitted to collect dues in the plant, and the Employer hereby agrees to cooperate in arranging for visits for this purpose, to provide a suitable place for receiving dues, and to name two (2) persons in the plant, each of whom shall have authority to make arrangements for such visits. These privileges shall be so exercised that no time is lost unnecessarily to the Employer, and the Union representatives shall advise Employer of such visits by notifying the plant office before or at the time of entering the plant. The privileges herein granted may be suspended for any willful violation of the provisions of this section, and such violation may be referred to the Adjustment Board as provided in Section 8.

SECTION 12. Vacation Period. Any employee who has been on the pay roll of a company for forty (40) weeks and has worked sixteen hundred (1,600) straight time hours, or more, during the current period of twelve (12) consecutive months from and after the date or anniversary date of his employment shall

receive one (1) week's vacation with pay, said vacation period to be taken prior to the beginning of the next processing season, or at other times by mutual consent. Vacation pay shall be based on a forty (40) hour workweek at straight time.[5]

SECTION 13. Compliance. In the event of a violation of any part of the agreement by an employer, party to this agreement, such violation shall be immediately brought before the Central Adjusting Board, herein provided for, and the ruling handed down by said Board and/or ninth disinterested person, if such person is required, shall be final and binding upon the parties. If such employer does not abide by that ruling it shall then be necessary for the California Processors and Growers, Inc., to immediately suspend that employer from that Association and no assistance will be given him by that body against the action deemed advisable and necessary by the Union, because of the refusal of the employer to accept the ruling handed down by the Central Adjustment Board and/or the ninth disinterested person, if such person is called into the case.

Likewise, in the event of a violation of any part of this agreement by the individual union in the plant or plants of the Employer, such violation will be immediately brought before the Central Adjust-

[5] "The current union agreement provides (Section 12) that 'Vacation pay shall be based on a forty (40) hour week at straight time.' This language contemplates that such vacation pay should be the normal straight time compensation of the individual concerned and consequently, when a worker has been assigned to more than one classification and received different rates of pay during the qualifying period, his vacation rate should be his average straight-time rate over such period, rather than that in effect immediately prior to the vacation."—Central Adjustment Board Ruling 5/15/42.

ment Board, provided herein, and the ruling handed down by such Board and/or disinterested party shall be final and binding upon the parties. If such individual union refuses to abide by the ruling handed down, it shall then be necessary to immediately recommend to the American Federation of Labor that that individual union shall not receive official recognition from the American Federation of Labor and the California State Council of Cannery Unions, and thereby prevent that individual union from receiving any assistance from those bodies until such time as the individual union agrees to comply with the ruling handed down by the Central Adjustment Board and/or the ninth disinterested person.

SECTION 14. Conflicting Agreements. In the event that the American Federation of Labor or the California State Council of Cannery Unions, or any of the local unions, parties hereto, make any agreement with any employer, within the jurisdiction of any individual local union, party to this agreement, as such jurisdiction now exists, the Employer hereunder shall be entitled, within the area included under the jurisdiction of any local union which is a party hereto, to the benefit of any terms contained in such agreement which may be more favorable to the Employer thereunder than those set forth herein, notwithstanding the provisions of this contract. A copy of all such agreements shall be filed with the California State Council of Cannery Unions, and the California Processors and Growers, Inc., at the time they become effective.

* * * * *

SECTION 18. Term of Agreement. The term of this agreement shall be until March 1, 1945, provided,

however, that either party may, by written notice given fifteen (15) days prior to December 31, 1943, or fifteen (15) days prior to December 31st of any subsequent year during the life of this agreement, reopen the same for the adjustment of wages, hours, and working conditions. Any changes desired shall be reduced to writing and delivered to the other party prior to, and negotiations must start not later than, the first business day in January next following receipt of such written notice and such negotiations must be completed before March 1st of same year. In the event that this agreement shall not have been modified previously, and in the event that no notice shall be given by either party to the other, as hereinabove provided, then the terms of this agreement shall automatically be extended for an additional period of one (1) year, and thereafter shall automatically be extended from year to year unless one of the parties shall give notice to the other of a desire to modify said agreement, at least fifteen (15) days prior to December 31st in any following year of the life of this agreement. In the event that such notice is given prior to December 31st as hereinabove provided, and negotiations are begun, the terms of the agreement as of the date of such notice shall remain in full force and effect during and until the following March 1st, and if negotiations continue beyond such date by mutual agreement, any agreement reached thereafter shall be effective retroactively to said March 1st. In the event no agreement is reached by said March 1st, however, either party may give notice to the other of the termination of negotiations and thereby cancel said negotiations and this agreement.

In Witness Whereof the parties hereto have set their hands and seals this 10th day of July, 1943.

CALIFORNIA PROCESSORS AND GROWERS, INC.,
By L. E. NEEL, *President.*
WILLIAM E. YEOMANS, *Secretary.*
CALIFORNIA STATE COUNCIL OF CANNERY UNIONS,
By L. J. HILL, *President.*
HAL P. ANGUS, *Secretary.*

Witnesses:
OMAR HOSKINS,
U. S. Commissioner of Conciliation.
GEORGE L. GOOGE,
Special Representative of American Federation of Labor.
J. PAUL ST. SURE,
Attorney for California Processors and Growers, Inc.

* * * * *

ADDITIONAL WAGE PROVISIONS

* * * * *

4. The provisions set forth herein shall be effective as of March 1, 1943, as a master contract and shall operate as a direct agreement between individual employers and individual local unions as to named plants and unions upon the execution of certificates in the manner and form as set forth in Section 2 of the collective bargaining agreement of June 10, 1941, and shall continue in full force and effect thereafter in accordance with the provisions of Section 18 of the collective bargaining agreement.

5. It is expressly understood that in the event wartime conditions or restrictions result to the canning industry by governmental order or action, whether

directly or indirectly, so as to interfere with or interrupt normal operations of the canneries covered by this agreement or the normal conditions of work in such canneries, then, notwithstanding the provisions of the collective bargaining agreement herein described, the Employer shall not be liable for any penalty or default during or as a result of such interference, interruption or restriction and similarly, the employees of the Union shall not be liable for any additional obligation to the Employer during or as a result of such interference, interruption or restriction. It is the intent of the parties hereto to provide an express waiver of contractual penalties to accomplish a mutual assumption of losses of time and production resulting from such government orders or actions, and it is further agreed that all reasonable efforts will be made to reach a mutual understanding as to any unforeseen operating or working problems that may result from other war-time conditions not covered by this waiver.

In Witness Whereof the parties hereto have set their hands and seals this 10th day of July, 1943.

California State Council
of Cannery Unions,
By L. J. Hill, *President,*
Hal P. Angus, *Secretary.*
California Processors and
Growers, Inc.,
By William E. Yoemans, *Secretary.*

SUPPLEMENTARY EMERGENCY AGREEMENT

This memorandum of agreement made and entered into this 10th day of July, 1943, by and between California Processors and Growers, Inc., as collective bargaining agent for those canning companies more particularly described in that certain collective bar-

gaining agreement executed on the 10th day of June, 1941, as amended January 26, 1942, and The American Federation of Labor and California State Council of Cannery Unions, as collective bargaining agent for those cannery workers' unions more particularly described in said collective bargaining agreement,

Witnesseth: That in consideration of the premises it is mutually agreed as follows:

During the cannery operating season of 1943, in order to alleviate the critical manpower shortage existing in California and to promote the continued operation of canneries and the essential production of food, the following emergency provision shall be in effect as modifications of the collective bargaining agreement executed this day:

1. The final three sentences of the second paragraph of Section 3 (a) are amended to read as follows:

> If such union members are not available for such employment, the Employer may hire any person not a member of the Union provided that such person will be required to file an application for membership in the local union or obtain an "Emergency" card from the local union before being put to work. An emergency worker shall not be required to complete his affiliation with the local union except as hereinafter provided, but shall have the right to do so at any time if he so desires, in which event any payments therefor made to the Union by such emergency worker shall be credited by the Union as payment on account of the regular initiation fee of such person. An emergency worker shall not acquire seniority rights and shall not continue his status as an emergency worker beyond the period of the operating season. If an emergency worker completes his affiliation with the Union, he shall acquire seniority from the date of original employment.

Upon filing application for union membership, or obtaining an emergency card, the person to be employed shall receive from the Union a written statement evidencing the fact, which statement shall be taken up by the Employer and returned to the Union when the person is put to work. It is further understood that emergency workers shall obtain renewals of their status from week to week, and that persons filing applications for membership in the local union shall complete their affiliation within ten (10) days after employment. The local union agrees that it will not unreasonably refuse to grant emergency status to any person; and that it will not unreasonably refuse to accept any applicant as a member.

2. It is further understood and agreed that the following provisions shall govern emergency workers during the 1943 cannery operating season:

New employees will be required to present a clearance from the Union before being put to work. In the case of applicants for regular union membership, the regular contract provisions will apply.

In the case of emergency workers, such workers will be required to present a receipt showing advance payment of 50¢ to cover the current week. Such receipt should indicate that no refund will be made if the employee works less than one week. The union undertakes to issue these 50¢ receipts at times when new employees are being hired, as now provided for clearances in the case of applicants for membership.

At the time of employment of emergency workers, such workers will be informed by the Employer that the contract provides that they must obtain new receipts from week to week.

After the initial employment of emergency workers, the Employer will undertake to investigate their status, week by week, to ascertain

whether or not they have a receipt for the current week's fee, paid in advance. In order to facilitate the making of this investigation, the Union should furnish the Employer, at least once a week, a list of all emergency workers who have made the required payment for the current week, and a list of those who have failed to do so.

The employers will not provide a check-off of weekly payments, nor undertake to make collections, but they will observe in good faith the requirement that emergency workers must obtain renewals of their status from week to week in order to continue at work.

The specific details of receipt forms and agreements as to dates for securing lists shall be worked out locally, and if any disputes arise, they shall be submitted to the special committee hereinafter provided.

Present or former union members will not be qualified to come within the category of emergency workers, but other new employees shall have the option of becoming either regular members or emergency workers, provided, however, that after working twenty-four (24) days, or after working all regular shifts whenever work is available for four (4) pay roll periods (whichever is the lesser total of working days) emergency workers will be deemed to be in the same category as other cannery workers and will be required to become members of the Union, unless they are employed elsewhere and are doing cannery work in addition to their regular employment.

Members of the armed forces shall be exempt from the payment of any fees or dues, it being understood that members of the armed forces may be employed in cases where there is a mutual determination that a shortage of civilian workers exists, but only when their employment will not interfere with the customary employment and regular engagement of civilians.

3. It is further understood and agreed that in order to further the purposes and administration of this Supplementary Emergency Agreement, a Special Committee is hereby established as follows:

> A Special Committee composed of (1) the representatives of The American Federation of Labor assigned by President William Green to assist California cannery workers' unions, (2) the Secretary-Treasurer of the California State Council of Cannery Unions, (3) the labor relations counsel of the California Processors and Growers, Inc., and (4) the Secretary of the California Processors and Growers, Inc., shall function during the 1943 cannery operating season. If any differences arise concerning the operation or administration of the provisions of this Supplementary Emergency Agreement, or if any manpower emergencies arise which threaten the continued operation of the canneries during the term of said agreement, such differences and such emergency problems, at the request of either party hereto, shall be referred to said Special Committee, and said committee shall have the responsibility and the exclusive authority to make all necessary adjustments or decisions to settle such differences or to meet such emergencies.

In Witness Whereof the parties hereto have set their hands and seals this 10th day of July 1943.

CALIFORNIA PROCESSORS
AND GROWERS, INC.,
By L. E. NEEL, *President,*
And WILLIAM E. YEOMANS,
Secretary.

CALIFORNIA STATE
COUNCIL OF CANNERY
UNIONS,
By L. J. HILL, *President,*
And HAL P. ANGUS, *Secretary.*

Witnesses:

OMAR HOSKINS,
U. S. Commissioner of Conciliation.

GEORGE L. GOOGE,
Special Representative of American Federation of Labor.

J. PAUL ST. SURE,
Attorney for California Processors and Growers, Inc.

This is to certify that A. F. of L. Cannery Workers Union, No._____, _____ County, California, hereby represents that a majority of the employees in _____ Plant of _____ located at _____ are members of said Union and individually for themselves and as a unit have designated said union as their representative for collective bargaining.

The said union hereby adopts that certain agreements made and entered into on the 10th day of July, 1943 by and between California Processors and Growers, Inc., for and on behalf of certain canning companies and The American Federation of Labor, and California State Council of Cannery Unions for and on behalf of certain cannery workers' unions, and promises to be bound thereby.

By authority of the Union.

CANNERY WORKERS UNION,
_____ COUNTY,
No. _____

By _____
President.

By _____
Secretary.

Dated: _____, 1943.

This is to certify that upon the representation of Cannery Workers Union, _____ County, No. _____, that a majority of the employees in _____ Plant of _____ located at _____ are members of said union and have designated said union as their representative for collective bargaining, the undersigned hereby adopts that certain agreement made and entered into as of the 10th day of July, 1943 by and between California Processors and Growers, Inc., for and on behalf of certain canning companies and The American Federation of Labor and California State Council of Cannery Unions for and on behalf of certain cannery workers' unions, and promises to be bound thereby.

_____

By _____

Authorized Officer

Dated: _____, 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1947